Office-Supreme Court, U.S.
FILED
AUG 11 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1822, 80-2010, 80-2020

In the Supreme Court of the United States

OCTOBER TERM, 1980

HAROLD ANCLE THORNBERRY, PETITIONER

v.

UNITED STATES OF AMERICA

BROWN MARTIN NOEL AND
HOWARD NEWTON DONNELLY, PETITIONERS

v.

UNITED STATES OF AMERICA

HARRY NORMAN SEITER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, it was reversible error for the prosecutor to call to the stand, and to note in his summation, four witnesses who claimed their privilege against self-incrimination.

2. Whether the Fifth or Sixth Amendment was violated by the introduction into evidence of a tape recording of a conversation between petitioner Thornberry and an informant prior to Thornberry's arrest or indictment.

3. Whether the jury venire was unconstitutional because it was not drawn from all counties in the District.

4. Whether the district court erred in ruling that letters from a government witness to his wife were within the privilege for confidential marital communications and therefore could not be used by defense counsel to impeach the witness.

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OPINION BELOW

The order of the court of appeals (Pet. App. 3a-7a)[1] is unreported.

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[1]Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 80-1822.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1981. A petition for rehearing was denied on April 1, 1981 (Pet. App. 8a). The petition for a writ of certiorari in No. 80-1822 was filed on May 1, 1981, and a supplemental petition was filed on June 10, 1981. The petition for a writ of certiorari in No. 80-2010 was filed on May 29, 1981. The petition for a writ of certiorari in No. 80-2020 was filed on Monday, June 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a one-month jury trial in the United States District Court for the Eastern District of Kentucky,[2] petitioners were convicted on one count of conspiracy to obstruct the enforcement of the criminal laws of the Commonwealth of Kentucky with the intent to facilitate an illegal gambling business, in violation of 18 U.S.C. 1511. Each petitioner was sentenced to a term of five years' imprisonment (Pet. App. 2a; 80-2020 Pet. App. 2a; C.A. App. 67-68, 73-74, 76-77). The court of appeals affirmed (Pet. App. 3a-7a).

The evidence at trial, the sufficiency of which is not challenged, is summarized in the opinion of the court of appeals (Pet. App. 3a-5a). In brief, it showed that between January 1977 and March 1978 petitioners Noel and Donnelly nightly operated an illegal poker game at an apartment owned by petitioner Thornberry in Covington, Kentucky. Thornberry received rent on the apartment and a

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[2]Petitioners' first trial, held in Covington, Kentucky, ended in a mistrial when an unauthorized communication was made to one of the jurors. In light of that occurrence and the publicity about the case in the Covington area, and after considering various other locations, the district court ordered that the retrial be conducted in London, Kentucky (C.A. App. 137-138).

share of the proceeds from the poker game (C.A. App. 673-674, 677). In furtherance of their venture, petitioners and others made payoffs to city councilmen and to several police officers, including petitioner Seiter, the Covington Chief of Detectives, in order to gain information and protection and to close down competing card games (C.A. App. 372-373, 491, 536-537, 668-674, 676-677, 679-682, 693, 697-699, 850-851).

During the trial, several witnesses identified four persons who were regular dealers at the nightly games. These dealers had been indicted in two of the three counts contained in the indictment against petitioners, but those counts were severed from the instant trial.[3] At the time of petitioners' trial, the dealers were still under indictment (80-1822 Pet. 5; Pet. App. 16a-17a).

The government called the dealers as witnesses. Outside the presence of the jury, the dealers' attorney informed the court that they would refuse to testify on grounds of self-incrimination. After hearing argument, the court permitted the prosecution to call each of the dealers to the stand and ask his name, address, age, and whether he intended on advice of counsel to assert his privilege against self-incrimination regarding all questions about the case (Pet. App. 26a). The court reasoned that the dealers' testimony, if forthcoming, would "probably * * * add something" to the case that "[n]obody else seems to know * * *" (*id.* at 21a), and that the jury would otherwise "wonder why [these] witnesses are not called * * *. [T]he jury may * * * wonder why these persons aren't here, who obviously were right in the place [where the gambling occurred]" (*id.* at 19a, 23a). After the first of these witnesses was called and asserted

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[3]Following petitioners' conviction, the remaining counts against them were dismissed upon the request of the government (80-1822 Pet. 7).

the privilege, the court instructed the jury that a witness has a personal right under the Constitution to refuse to testify, and, "by virtue of his raising that privilege, that should not in any way raise any inference of guilt or innocence pertaining to any defendant in this particular case" (*id.* at 29a-30a). After inquiry by the court, defense counsel did not request any additional admonitions to the jury (*id.* at 30a). The court then informed the jury that the preceding cautionary instruction "pertains to the testimony of any other witness who might come in this case and assert a Fifth Amendment privilege" (*ibid.*), and this direction was repeated following the appearance of each of the three remaining dealers (*id.* at 31a, 32a, 33a).[4]

In addition, the government presented the testimony of an undercover informant and introduced tape recordings that the informant made of conversations with petitioner Thornberry. In these conversations Thornberry discussed his connections with the Covington Police Department and stated that he had obtained promotions for and paid bribes to various members of the Department (Pet. App. 5a).

The government also called Phillip Pointer as a witness. Pointer testified that he saw petitioners Seiter and Donnelly together and that Seiter put a large wad of money in his pocket and said " 'the boys will be happy with this.' " Pointer further testified that he observed Donnelly give Thornberry some large bills (Pet. App. 4a). As part of his cross-examination of Pointer, Seiter sought to impeach this testimony by referring to letters that Pointer had written to his wife regarding the possibility of a "deal" with the government in return for his cooperation. While allowing thorough cross-examination on the issue of a possible "deal" between Pointer and the government, the district

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[4]Four months later, each of the dealers pleaded guilty to conducting an illegal gambling business, in violation of 18 U.S.C. 1955.

court ruled that the subject of the letters was within Pointer's privilege for confidential marital communications and therefore could not be inquired into.

ARGUMENT

1. Arguing that the decisions of the court of appeals in these and other cases have created a conflict among the circuits, petitioners principally contend (80-1822 Pet. 8-16; 80-2010 Pet. 15; 80-2020 Pet. 5-7) that it was reversible error to call to the stand the poker dealers who were expected to invoke their Fifth Amendment privilege against compelled self-incrimination. However, this Court has recently declined to review an identical claim concerning the decisions of the court below. See *Wooten* v. *United States*, cert. denied, No. 79-1580 (Oct. 6, 1980). For the reasons stated in our brief in opposition in *Wooten*,[5] further review of the present case is also unwarranted.

Here, the challenged events neither "added critical weight to the prosecution's case" nor constituted "prosecutorial misconduct * * * [based on] a conscious and flagrant attempt to build its case out of inferences arising from [the] use of the testimonial privilege." *Namet* v. *United States*, 373 U.S. 179, 186-187 (1963). See also *Douglas* v. *Alabama*, 380 U.S. 415, 420 (1965). The government introduced ample evidence in a lengthy trial to demonstrate petitioners' guilt, including testimony from players in the poker games and tape recordings of petitioner Thornberry's conversations with an FBI informant (Pet. App. 4a-5a). Moreover, as the district court recognized (*id.* at 19a, 23a), the failure to call the dealers as witnesses might have left doubts in the minds of the jurors and unfairly detracted from the government's case. Finally, the district court

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[5]A copy of the *Wooten* opposition is being sent to counsel for petitioners.

immediately gave and subsequently re-emphasized a cautionary jury instruction that a witnesses's assertion of his Fifth Amendment privilege "should not in any way raise any inference of guilt or innocence pertaining to any defendant in this particular case" (*id.* at 30a). See *Namet* v. *United States, supra*, 373 U.S. at 187. In these circumstances, balancing "the factfinder's need to operate with as much relevant information as possible" and the "prejudice which may result to a defendant from inferences which may be drawn if a witness takes the fifth amendment" (*United States* v. *Vandetti*, 623 F. 2d 1144, 1149 (6th Cir. 1980)), the court of appeals correctly concluded (Pet. App. 5a-6a) that no reversible error had occurred.[6]

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[6]Petitioner Thornberry's citation to cases in other circuits (80-1822 Pet. 11) does not establish the existence of a conflict. A majority of these cases simply hold that the district court did not abuse its discretion in refusing to permit a defendant to call a co-defendant or other witness associated with the crime for the purpose of asserting the witness's privilege against self-incrimination before the jury. See *Bowles* v. *United States*, 439 F. 2d 536 (D.C. Cir. 1970) (en banc), cert. denied, 401 U.S. 995 (1971); *United States* v. *Reese*, 561 F. 2d 894 (D.C. Cir. 1977); *United States* v. *Johnson*, 488 F. 2d 1206 (1st Cir. 1973); *United States* v. *Maloney*, 262 F. 2d 535 (2d Cir. 1959); *United States* v. *Harris*, 542 F. 2d 1283 (7th Cir. 1976); *United States* v. *Roberts*, 503 F. 2d 598 (9th Cir. 1974); *United States* v. *Martin*, 526 F. 2d 485 (10th Cir. 1975). In another group of cases, it was found that the trial court committed reversible error because the defendant was clearly and unjustifiably prejudiced by the witness's assertion of the Fifth Amendment privilege in the presence of the jury, the prosecutor had engaged in misconduct, or the trial court failed to give cautionary instructions to the jury. See *Fletcher* v. *United States*, 332 F. 2d 724 (D.C. Cir. 1964); *San Fratello* v. *United States*, 340 F. 2d 560 (5th Cir. 1965); *United States* v. *Ritz*, 548 F. 2d 510 (5th Cir. 1977); *United States* v. *King*, 461 F. 2d 53 (8th Cir. 1972); *United States* v. *Coppola*, 479 F. 2d 1153 (10th Cir. 1973); see also *United States* v. *Tucker*, 267 F. 2d 212, 215 (3d Cir. 1959). And in *United States* v. *Beechum*, 582 F. 2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979), the court merely held that the defendant waived his privilege by taking the stand and that the district court therefore did not err in allowing the government to ask questions that elicited an invocation of the Fifth Amendment.

Petitioners also contend (80-1822 Pet. 13-16; 80-2010 Pet. 15; 80-2020 Pet. 6-7) that the prosecutor's closing argument drew improper inferences from the dealers' refusal to testify as government witnesses. The record belies this contention. Indeed, in the course of explaining that the government bore the burden under 18 U.S.C. 1511 of proving that five or more persons were involved in the illegal gambling business, the prosecutor expressly stated (Pet. App. 35a; emphasis added):

> You get to the dealers. Now, the United States brought these dealers in here and put them on the stand. *But we didn't get anything out of them. And you are not to infer, you know, that that is anything against the defendants.* But we wanted to put all the people on that we could that were at that game and obviously the dealers were at that game, to have them tell you what was going on.

In light of the nature and context of these remarks and the absence of any objection to them by defense counsel, the court of appeals correctly held (*id.* at 6a) that the prosecutor's closing argument did not amount to reversible error.

2. Petitioner Thornberry next contends (80-1822 Supp. Pet. 3-9) that the Fifth and Sixth Amendments were violated by the introduction into evidence of tape recordings of his statements to a government informant. These claims are without merit.

Some of the conversations in question were recorded by the undercover informant after Thornberry had been informed of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and had declined to talk with FBI agents. At that time, however, Thornberry had been neither arrested nor detained in any way. Because Thornberry was not "in[] custody or otherwise deprived of his freedom of action in any significant way" (384 U.S. at 444), *Miranda* has no

application here. See, *e.g.*, *Edwards* v. *Arizona*, No. 79-5269 (May 18, 1981), slip op. 4-5, 8-9; *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495 (1977); *Beckwith* v. *United States*, 425 U.S. 341, 346 (1976). Accordingly, Thornberry's statements to the informant were not obtained in violation of the Fifth Amendment. See *Hoffa* v. *United States*, 385 U.S. 293, 303-304 (1966).

Similarly, Thornberry's Sixth Amendment right to counsel was not violated. By its terms the Sixth Amendment applies to "criminal prosecutions," and the "clear rule of [the Sixth Amendment] is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." *Brewer* v. *Williams*, 430 U.S. 387, 401 (1977). See also *United States* v. *Henry*, 447 U.S. 264 (1980); *Massiah* v. *United States*, 377 U.S. 201 (1964). Here, "judicial proceedings ha[d not] been initiated against [Thornberry]—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *Brewer* v. *Williams, supra*, 430 U.S. at 398, quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972). The government did no more than "use[] [an] undercover agent[] to obtain incriminating statements from [a] person[] not in custody but suspected of criminal activity prior to the time charges are filed" (*United States* v. *Henry, supra*, 447 U.S. at 272), and this investigatory procedure is not barred by the Sixth Amendment. See *Hoffa* v. *United States, supra*, 385 U.S. at 309-310.[7]

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[7]Petitioner Thornberry suggests (Supp. Pet. 7) that FBI agents "had focused on him as an accused in their investigation of criminal activity." Insofar as this suggestion is pertinent at all, we note that the original indictment in this case, returned subsequent to the events of which Thornberry complains, did not name Thornberry as a defendant. Petitioner was first included as a defendant in the superseding indictment filed three weeks later (C.A. App. 575).

3. Petitioners Noel and Donnelly further claim (80-2010 Pet. 4-14) that the jury was unconstitutionally impaneled because it was not chosen from a reasonably representative cross-section of eligible jurors in the Eastern District of Kentucky. In particular, they complain that the jury was disproportionately rural in composition because it was selected from people residing in and around London, Kentucky, rather than from the District as a whole.

Although the Eastern District of Kentucky is not subdivided into judicial divisions, Congress has authorized federal trials to be held in eight cities within the District. See 28 U.S.C. 97. By judicial order, the juries serving in each city are drawn from the counties closest to that city.

Petitioners were originally tried in Covington, Kentucky, but a mistrial was "declared on motion of the defendants due to a communication made to one of the jurors in Covington" (C.A. App. 137; see also *id.* at 120-121). Because of this incident and the publicity surrounding the trial in Covington,[8] the district court initially ordered that the retrial be held in Frankfort, Kentucky (C.A. App. 121). However, the court later learned that "due to the racing season in Lexington, lodging facilities are practically impossible to find in the Lexington-Frankfort area" at the time the trial was scheduled (C.A. App. 137). Moreover, the court determined that defense counsel were unavailable during alternate trial dates (C.A. App. 137, 138). Finally, the court considered the other cities in the District available for trial and concluded that London was "the most convenient to the parties and witnesses" (C.A. App. 138). Accordingly, "in consideration of the requirements of the Speedy Trial Act * * * [and] with due regard to the convenience of

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[8]Petitioner Thornberry had previously moved for a change in the location of the trial on the ground of prejudicial publicity (see, *e.g.*, C.A. App. 123-124, 138).

the witnesses and defendants in this matter" (C.A. App. 137), the court ordered that the retrial be conducted in London.

On the morning of trial in London, petitioners moved to strike the jury venire on the ground that it was composed only of jurors residing in the counties around London and therefore did not constitute a fair cross-section of the District. Petitioners asserted that these counties were predominately rural and agricultural, in contrast to the principally urban counties surrounding Covington (C.A. App. 182, 185).

The district court denied the motion for two reasons. First, the court held "that the motion is not timely made. If it had been made earlier, we could have considered whether a jury drawn from the district-at-large would be appropriate" (C.A. App. 188). Second, the court concluded that there was sufficient "justifi[cation] in assigning [the] case within the district at some other location [than Covington]" and that "the reason for the jurors coming from these particular counties [around London] is in line with the fact that jurors may be excused on finding that there is an extreme inconvenience or hardship if the juror resides at a distance [of] more than 75 miles from the place of holding court" (C.A. App. 188-189).

Against this background, further review of petitioners' claim is not warranted. As the district court expressly found, petitioners' challenge to the composition of the jury panel drawn from the London area was untimely. Petitioners do not contest this holding, which fully disposes of their contention.

In any event, petitioners' argument is substantively unavailing and does not warrant further review.[9] For the

[9]We assume arguendo, for purposes of this opposition, that the urban or rural attributes of potential jurors constitute a distinct and identifiable characteristic that must be fairly represented on the jury panel, and

reasons stated in the opinion of the court of appeals and in our brief in opposition (at pages 3-5 & n.3) in *United States* v. *Young*, 618 F. 2d 1281, 1287-1288 (8th Cir. 1980), cert. denied, No. 79-2076 (Oct. 6, 1980),[10] the Sixth Amendment requires only that the jury panel represent a fair cross-section of the "community" from which the panel is drawn, and it does not prohibit a panel to be selected from one division or area of a judicial district. Especially in the circumstances of this case, where persons from remote counties would have been entitled (see C.A. App. 188-189) to a hardship exemption from serving on a jury in London pursuant to the Jury Selection and Service Act of 1968 (see 28 U.S.C. (1863(b)(5) and explanatory note),[11] a jury panel drawn from the London area was not unconstitutional.

4. Lastly, petitioner Seiter argues (80-2020 Pet. 8; see also 80-2010 Pet. 15) that under the intervening decision of this Court in *Trammel* v. *United States*, 445 U.S. 40 (1980), the district court erred in holding that the privilege for confidential marital communications precluded the defense from seeking to impeach a government witness concerning letters the witness had written to his wife about a possible "deal" with the government.

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that petitioners proffered sufficient facts to the district court to raise a colorable claim that the venire was not a representative cross-section. Both of these propositions are subject to doubt, however. For example, the jury area for Covington, like that for London, includes a number of rural counties. Moreover, petitioners have cited no authority to support their view that the urban residents of a locality are " 'distinctive groups' " that must be reasonably represented. *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979), quoting *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975).

[10]A copy of our opposition in *Young* is being provided to counsel for petitioners.

[11]The Court has previously declined to review claims that such exemptions violate the Sixth Amendment. See, *e.g.*, *United States* v. *Lewis*, 504 F. 2d 92 (6th Cir. 1974), cert. denied, 421 U.S. 975 (1975); see also *United States* v. *Fernandez*, 480 F. 2d 726, 730-735 (2d Cir. 1973).

The district court's ruling was correct and accords with this Court's decisions recognizing a privilege for confidential marital communications. See *Blau* v. *United States*, 340 U.S. 332 (1951); *Wolfle* v. *United States*, 291 U.S. 7 (1934). Nor does *Trammel* v. *United States* suggest a different result. *Trammel* involved the "privilege against adverse spousal testimony" (445 U.S. at 41, 44) rather than the distinct "confidential marital communications privilege" (*id.* at 45 n.5) at issue here, and the Court specifically noted that its "holding today does not disturb *Wolfle* and *Blau*" (*ibid.*).

Moreover, petitioner was not prejudiced by the district court's ruling. The government witness was extensively cross-examined about any "deal" he might have made in exchange for his testimony, and petitioner has never contended that the letters (which were produced to the defense, see 80-2020 Pet. 8) were inconsistent with the witness's statements at trial. Thus, petitioner was allowed adequate latitude to impeach the witness on the basis of interest or bias, and petitioner's substantive rights were not infringed by the court's determination that the subject of the letters between the witness and his wife was within the marital privilege.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

DOJ-1981-08